Filed 12/11/08 In re J.T. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.T. et al., Persons Coming Under the Juvenile Court Law.	B206030 (Los Angeles County Super. Ct. No. CK61242)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. F.T., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Stephen Marpet, Commissioner. Affirmed.

Anna Lois Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and Respondent.

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In this dependency proceeding, we affirm the denial of F.T.'s (father's) petition pursuant to Welfare and Institutions Code section 388. (All undesignated statutory citations are to the Welfare and Institutions Code.) Father showed no changed circumstances and there was no evidence that renewing father's reunification services would serve the best interest of his three children. We also affirm the termination of father's parental rights. Contrary to father's argument, there were no exceptional circumstances warranting a permanent plan other than adoption.

FACTUAL AND PROCEDURAL BACKGROUND

The Department of Children and Family Services (DCFS) filed a petition on October 5, 2005, alleging that J.T., S.T., and R.T. came within the jurisdiction of the superior court under section 300. The children were initially placed in the home of their paternal uncle. On November 17, 2005, father was convicted of domestic violence.

On January 4, 2006, father stipulated to the following allegations: On prior occasions, father used inappropriate physical discipline with J.T. and S.T.[1] Father engaged in domestic violence in the presence of the children. Father has a history of substance abuse, which limits his ability to provide regular care. Father agreed to participate in a parenting program and counseling that included rehabilitation and random drug testing, domestic violence, and anger management. The juvenile court sustained the allegations as stipulated to by father. Father was given monitored visits.

In June 2006, DCFS reported father was not in compliance with the case plan. DCFS reported that father was arrested for robbery and was incarcerated. DCFS recommended terminating reunification services. The court found that father was in "very little compliance" but continued father's reunification services. On October 25, 2006, the court found father was not in compliance with the case plan, there was no likelihood he would reunite with the children in the next six months and terminated his

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[1] Mother also stipulated to the petition. However, we need not describe the allegations with respect to her because she is not a party to this appeal.

reunification services. On April 25, 2007, DCFS reported that father had been incarcerated since June 11, 2006, and had maintained written contact with the children.

On October 12, 2007, father filed a section 388 petition. He stated that the following changes occurred: "Father is in a conservation prison camp where he takes NA and AA classes and participates in community service and firefighting and father expects to be transferred to a facility that offers substance abuse treatment; father has maintained letter contact with children through the department." Father requested further reunification services. The petition was denied without a hearing. Father did not appeal from that order.

On October 16, 2007, DCFS reported that the children had not had any physical contact with father, who remained incarcerated, but he routinely wrote them. On June 25, 2007, the children were placed in the home of their maternal grandparents. The maternal grandparents had custody of the children's half sibling and were in the process of adopting him. At the time of the section 366.26 hearing, the children had been living with their grandparents in Texas for six months.

Father filed a second section 388 petition on December 20, 2007. The petition repeated the same allegations as his prior unsuccessful petition. The court denied the petition finding that providing father further reunification services was not in the children's best interest and no change of circumstance existed to support the petition.

At the section 366.26 hearing, father testified that he was incarcerated June 11, 2006. Prior to that, he regularly visited the children. When he visited the children, father played with them and helped them with their homework. In a letter, the children told father they loved him. With respect to the future, father's intention was "to do my drug program for myself first and then for everybody else and then go from there." He was hoping to be able to fulfill his parole requirements in Texas.

Prior to his incarceration, father did not complete any programs required by his case plan. "I was still doing drugs. I could admit to that, and this is the problem why I committed the robbery. I was supposed to go to a substance abuse program through prison, but they sent me to fire camp . . . ." Father's visits were always monitored.

Mother testified that every time she saw the children, they would ask about father. She testified that the children had a relationship with their father, and she explained there were "good times" and "bad times." Before he was incarcerated, father visited the children and S.T. stated a desire to be with father. Father wrote to the children and they wrote to him.

Mother testified the children were doing very well in school and liked living with their grandparents.

The court found that section 366.26, subdivision (c)(1)(B)(i) did not apply. It concluded the children were likely to be adopted and terminated parental rights.

Father filed a notice of appeal February 15, 2008. The notice of appeal states that the appeal is from the "December 20, 2007 order terminating parental rights." Two boxes in the notice of appeal were checked. One states that the appeal was from a section 366.26 hearing and the other that the appeal was from "[o]ther appealable order relating to dependency," but no other order was specified.

DISCUSSION

I. There Was No Error in Denying Father's Section 388 Petition

We agree with respondent, that father should have identified the denial of his section 388 petition without a hearing in his notice of appeal. Nevertheless, we liberally construe the notice of appeal from the termination of parental rights to include the denial of the section 388 petition filed on December 20, 2007. (*In re Madison W.* (2006) 141 Cal.App.4th 1447, 1451.) The denial of the December 20th petition and termination of parental rights occurred on the same day, and a single document includes both juvenile court orders. An appeal from father's first section 388 motion, which was denied October 16, 2007, is untimely. (§ 395; Cal. Rules of Court, rule 5.585(f).) However, the distinction between the two petitions is of limited relevance since they contain the same information.

Section 388, subdivision (a) provides in pertinent part: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of

change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

If the petition shows changed circumstances or new evidence indicating that the proposed modification "may be" in the child's best interests, the juvenile court must hold a hearing on the petition. (§ 388, subd. (c).) If, however, the petition fails to "make a prima facie showing (1) of a change of circumstances or new evidence requiring a changed order, and (2) the requested change would promote the best interests of the child," the juvenile court may deny the petition without a hearing. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189; see also *In re Josiah S.* (2002) 102 Cal.App.4th 403, 419.) In determining whether the petition makes a prima facie case, courts may consider the entire history of the case. (*In re Justice P.*, at p. 189.)

Section 388 petitions "are to be liberally construed in favor of granting a hearing to consider the parent's request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310.) "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The parent's burden is particularly weighty when the section 388 petition is made "'on the eve of the section 366.26 permanency planning hearing,'" when "'the children's interest in stability [i]s the court's foremost concern and outweigh[s] any interest in reunification. [Citation.]' [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) We review the juvenile court's denial of a section 388 petition for abuse of discretion. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

There was no abuse of discretion in this case. The petition showed no new circumstances. It stated that father was incarcerated; attended programs during his

incarceration; and wrote to the children. This does not show any changed circumstance. Throughout the dependency, DCFS documented that father was incarcerated and wrote to the children. Father's attendance of programs does not show that he made any progress toward eliminating the factors that required placement outside his care. His attendance in some classes does not show a prima facie case of a changed circumstance.

In addition, there was no evidence that the best interest of the children would be promoted by granting father reunification services. "[E]ach child's best interests would necessarily involve eliminating the specific factors that required placement outside the parent's home," something father fails to allege. (*In re Angel B., supra*, 97 Cal.App.4th at pp. 463-464.) The children were doing well in a stable placement with their grandparents who intended to adopt them and who (not father) provided for all of the children's daily needs. Although at the outset father's reunification was the primary goal of the dependency proceeding, by the time he filed his petition, the focus had shifted to providing stable care for the children. Extending reunification services for father would not promote stability for the children and therefore would undermine their best interests. A formal hearing on the section 388 petition therefore was not warranted.

II. There Was No Error in Finding That the Section 366.26, Subdivision (c)(1)(B)(i) Exception to Terminating Parental Rights Was Inapplicable to Father

If a court finds a child adoptable, it must terminate parental rights at a section 366.26 hearing absent a relevant exception. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416.) Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the preference for termination of parental rights where "[t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." To fall within the ambit of this exception, a parent must show the parent-child relationship is "sufficiently strong that the child would suffer detriment from its termination." (*In re Beatrice M.*, at p. 1418.) At this late stage in the dependency proceedings, the parent carries the burden to show that the termination of parental rights would be detrimental to the child. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.) "The statutory exceptions merely permit the court, in *exceptional*

circumstances [citation], to choose an option other than the norm, which remains adoption." (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

The benefit the child would receive is not considered in isolation, but the natural parent-child relationship must "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "Interaction between [a] natural parent and child will always confer some incidental benefit to the child . . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*Ibid.*) We review the trial court's conclusion for substantial evidence (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53), but under any standard we would find the juvenile court's decision in this case to be correct.

Father could not maintain regular contact or visitation with the children because he was incarcerated most of the dependency proceeding. Prior to his incarceration, father visited the children, but his visitations never progressed to unmonitored. There was no evidence father ever provided for the children's needs. While a beneficial relationship may exist without daily contact (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51), there was no showing that the children enjoyed a significant relationship with father.

There was no showing that the children's relationship with father would promote their well-being to any extent that would outweigh the well-being the children receive from being adopted by their grandparents. The children lived with their grandparents and half sibling. They were doing well in school and liked living with their grandparents. Father could not predict when he might be able to care for the children as he still awaited parole and a substance abuse program. Nor was there any showing that the children had

a significant positive emotional attachment with father. They wrote him letters and told him they loved him, but there was no evidence they relied upon him for any emotional support or that he provided any emotional support to them. This limited attachment does not outweigh the security and sense of belonging the children will receive from living with their grandparents, who also are adopting the children's half sibling.

DISPOSITION

The juvenile court's orders denying father's section 388 petition and terminating father's parental rights are affirmed.

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COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.